ADMINISTRATIVE APPEAL DECISION

BENDERSON DEVELOPMENT COMPANY, INC.

FILE NO. 95-987-1(1)

BUFFALO DISTRICT

April 7, 2000

Review Officer: Robert D. Deroche, U.S. Army Corps of Engineers, Detroit District, Detroit, Michigan.

Applicant Representative: Ms. Terresa M. Bakner, of Whiteman, Osterman, and Hanna, Attorneys at Law, One Commerce Plaza, Albany, New York 12260.

Date of Appeal: September 17, 1999.

Basis for Appeal: Presented by Applicant's Attorney.

Count I: The Buffalo District (District) misapplied the Corps' public interest review factors.

Count II: The District misapplied the EPA's Section 404(b)(1) Guidelines.

Count III: The District improperly disregarded the decision of the New York State Department of Environmental Conservation (NYSDEC) and the Town of New Hartford (Town) to offer Benderson Development Company , Inc. (BDC) a permit.

Count IV: The District incorrectly excluded important documents in the record from consideration and prejudged BDC's permit application.

Appeal Conference Date: November 16, 1999.

Review Officer Decision and Recommended Instructions to Buffalo District Commander:

Count I: Appeal Has Merit: The RFA identifies a number of public interest factors that they (the appellant and his agent(s)) claim were improperly addressed. The issues were jurisdiction for upland buffers, wetland values and mitigation, flood hazard and flood plain values, traffic safety, recreation, and economics . Regulations at 33 CFR 320.4(a) dictate what factors are to be included in the Public Interest Review. These Regulations state "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits, which reasonably may be expected to accrue from the proposal, must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it

Encl

will be allowed to occur, are therefore determined by the outcome of this general balancing process." Except for the word "careful", the Regulations do not state how such weighing and balancing is to be accomplished. Determining the extent to which each factor will impact the environment is a difficult task performed daily by Corps project managers; one performed through use of education, experience and best professional judgement of the Corps project manager. In this case, the District enlisted the help of its experts at the Waterways Experiment Station (WES) to assist in its evaluation of the environmental impacts. The applicant may supply all the documentation he wishes in support of his determination of impacts, however, in the end this determination is made by the Corps of Engineers.

The Request For Appeal (RFA) states that "...the Corps is precluded from regulating forested uplands as waters of the United States. Section 404 of the CWA does not provide the Corps with the authority to require buffer zones around regulated wetlands, let alone the authority to impose a buffer zone around non-jurisdictional uplands." (RFA at 20) While the first statement is true, the Corps cannot regulate forested uplands as waters of the U.S., the Corps can, however, require buffer zones around regulated wetlands. (See Final Notice of Modification of Nationwide Permit 29 for Single Family Housing, Federal Register/Vol. 64, No. 167/Monday, August 30, 1999/ Notices, Pg. 47177; and, Army Corps of Engineers Standard Operating Procedures for the Regulatory Program, issued under memorandum dated October 15, 1999) The pre-amble to the Corps Proposal To Issue and Modify Nationwide Permits (Federal Register/Vol.64, No. 139/ Wednesday, July 21, 1999/Notices/Page 39273) also contains a discussion on this subject.

The Corps, in its Supplemental Environmental Assessment and Statement of Findings (SOF), states that the wet meadow at the base of the slope of the old trailer park could be filled provided its functions and values are compensated for in the mitigation plan (SOF at 27). They also state that BDC's mitigation plan offered with CP-6B exceeds that amount of mitigation that would be required for the project if a permit was approved (SOF at 16). It must be noted, however, that a permit will not be issued unless the District is satisfied that proper sequencing has been followed, i.e., avoidance of wetland impacts, if possible, then minimization of wetland impacts to the maximum extent practicable.

The RFA states that the District did not consider the off-site mitigation when determining that CP-6B would have significant adverse impacts on recreation through the diminishment of wildlife habitat. The District did acknowledge that limited recreational use of the project site exists due to private ownership and restricted access. It is within the District's responsibility, however, to consider secondary impacts when the project site is private property. Anytime development is planned in an area that has not been previously developed, additional wildlife habitat is lost, regardless of proposed mitigation, as mitigation itself will usurp some existing habitat. The District appropriately determined that the project will cause minor, permanent adverse impacts to recreation as a result of this loss. It is also the District's call whether or not minimization has been achieved. Until the District is convinced that the project represents the least environmentally damaging, practicable alternative, the District is not required to include the mitigation proposal in its review.

The appellant argues that the construction methods for the new stream channel will prevent negative impacts to the Liberty Garden Wetlands area. They contend that their proposed construction methods would prevent drainage of the wetlands. The applicant also identified those actions as mitigation features to protect the wetlands. The district did not accept the applicant's findings that the proposals were adequate to protect the wetlands after evaluating the risk of failure of those proposals. The District, however, did not clearly address the risk of failure and clearly explain how the applicant's mitigation measures and construction methodologies fail to offset the potential wetland impacts.

The District's environmental assessment explains that the Town identified flooding in this area as a serious concern. The District, based upon input from the Corps experts at WES, questions whether future hydrologic conditions in the watershed have been realistically estimated and recommends that an accurate assessment of the hydrologic conditions in the watershed be undertaken. The determination that the project will have a substantial detrimental impact on Flood Hazards and Flood Plain Values is based upon WES's review of the consultant's use of flooding models and upon experience (SOF at 22, 23).

The District's assessment also properly explains how traffic safety concerns are minor, temporary, and due to construction of the shopping center, and how this concern is wholly under the jurisdiction of state and local authorities.

The RFA states that the District failed to properly discuss or consider any of the economic benefits that will be provided by this project. The District does acknowledge the benefits presented by the applicant. What is in question is the weight attributed to each of these factors. Regulations at 33 CFR 320.4(a)(3) state "The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal." The Regulations do not give specific instructions on how to go about determining the importance and relevance of each factor; a responsibility left to the discretion of the Corps project manager. In this case, however, the economic benefits and detriments to the public interest would appear to be one of the more important considerations for this project, especially when taking into consideration the economic conditions of the County, particularly the New Hartford area. Regulations at 33 CFR 320.4(q) state that when an application is submitted by private enterprise "... it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place." The District must consider the applicant's expertise when considering the "need" within a geographic area for a project of this size unless the District prepares its own independent review of need. The benefits, therefore, warrant more than a mention in the public interest review process document.

The permit decision is remanded to the District Engineer (DE) to clearly explain the District's reasoning for finding that the applicant's proposed construction and mitigation measures would not protect the Liberty Gardens Wetlands from adverse impact. The permit decision is also

remanded to the DE to re-evaluate economics within the public interest review section of his assessment. The RFA correctly states that the District has, to a degree, merged the public interest review process and the separate review process under the Section 404(b)(1) Guidelines. Because a project must pass both the public interest review section of the Corps' assessment, as well as the 404(b)(1) Guidelines analysis section, it is important to keep these two reviews independent. With independent reviews, should a project fail one or the other, or both, the Corps project manager and/or the applicant will be able to easily determine under which area the shortcomings were present. The extensive discussion of the alternative costs should not be contained within the public interest review section of the supplemental environmental assessment but reserved for the 404(b)(1) alternative analysis section.

Count II: Appeal Has Merit: The appellant argued four points claiming that the District did not correctly apply the guidelines to the preferred alternative CP-6B. The four points were (a) there is no practicable alternative to CP-6B. (b) Water Quality will not be adversely impacted by CP-6B (c) CP-6B will not contribute to the significant degradation of waters of the U.S., and (d) the proposed mitigation offered with CP-6B is more than adequate to offset any adverse impacts or loss of wetlands.

The applicant and the District both agree that step one of the avoid, minimize, and compensate sequence has been met and that there are no other practicable alternative locations available for the project. The point of contention is whether or not there is an alternative footprint available for the project that would have less environmentally damaging impacts and still be practicable. The RFA (in Count I) states that other smaller alternative project layouts will not generate greater revenues than CP-6B and that the cost of land remained constant though the developable area was reduced (RFA at 23). The District review, completed by an in-house economist, of the economic analysis provided by the applicant found these two factors unaccounted for which, the District believed, skewed the results of the analysis in favor of the applicant. The District should have brought these concerns to the Appellant's attention immediately after it completed its in-house review as the Appellant may have been able to address the District's concerns and explain their actions, as they attempted to do in the RFA. The RFA correctly cites regulations that require the consideration of costs when determining if an alternative is practicable. Appropriately, however, the District did not give undue deference to the confidential financial data supplied by the applicant evaluating the potential profitability/economic viability of practicable alternatives, especially in regard to less environmentally damaging onsite configurations. **Reference Old Cutler Bay Associates Guidance dated 13 September 1990.**

The District was justified in addressing water quality concerns when the State had already issued their Water Quality Certification (WQC). The District acknowledges that WQC was issued by NYSDEC; however, it also notes that the NYS-WQC standards are designed to protect the quality of receiving waters and do not address water quality issues related to wetlands. The RFA correctly cites regulations as stating that WQC will be considered conclusive on water quality considerations. The District must also consider water quality impacts to wetland values and functions. The District found that the proposed alternative CP-6B will adversely impact

wetlands and waters and therefore, could contribute to degradation of water quality.

The District basically concurs with the Appellants statements regarding specific wetland areas and the potential for their successful re-creation; however, with input from WES, the District has stated that only through the avoidance of direct and indirect impacts to the Liberty Garden Wetlands will water quality functions be preserved. Again, it is the District's determination as to potential degradation of water quality resulting from a project. To reiterate, while the District did state that the proposed mitigation exceeds that which would normally be required for a project of this scale, it is also the District's call whether or not minimization has been achieved. Until the District is convinced that the applicant's preferred alternative represents the least environmentally damaging, practicable alternative, the District is not required to include the mitigation proposal in its review. The district finds that to avoid potential significant degradation of waters of the U.S., impacts to the Liberty Gardens wetlands must be avoided.

The permit decision is remanded to the District Engineer (DE) to give the Appellant the opportunity to address the concerns that emerged when the District reviewed the economic analysis they submitted. The District did not have the answers to their questions (and therefore did not have complete information) regarding this analysis when they made their decision.

Count III: Appeal Has Merit: The district should identify significant national issues and explain how they are overriding in importance when denying permits issued by State and Local permitting authorities.

The RFA inaccurately deduced that the District's statement "This decision is not contrary to any state or local decisions..." (SOF at 31) referred to the decision to deny CP-6B when in actuality the statement refers to the District's decision to offer a permit similar to CP-7, one with less impacts. On the other hand, the RFA accurately cites regulations at 33 CFR 325.2(a)(6) concerning the inclusion of significant national issues within the decision document and the explanation of how they are overriding in importance when the decision of the District is contrary to state and local decisions.

The permit decision is remanded to the DE to document whether the project impacts national issues. The District has identified, although not singled out as a national issue, water quality concerns; however, it has failed to demonstrate how these concerns are overriding (of the state and local decision) in importance. The District must clearly identify these issues, within the decision document, and explain how they are overriding in importance when issuing a decision contrary to state and local decisions.

Count IV: Appeal Has Merit: The District excluded two documents submitted by the applicant from the District Engineer's decision package. The RFA has quoted the regulations at 33 CFR 325.2(a)(3) out of context. "The District Engineer will consider all comments received *in response to the public notice* ...on the permit application." The Corps did not solicit the documents submitted by the applicant, nor were they in response to the public notice; however,

they were offered by the applicant in support of their project and should have been considered.

While the regulations do not specifically state that the District Engineer must consider all correspondence received in rendering a final decision on a project, it is logical to assume that any correspondence from the applicant will be in support of his project and should be considered. Regulations at 40 CFR 1506.5(b) state that an applicant may prepare an environmental assessment, however, the agency shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the assessment. Further, the agency must independently evaluate the information submitted and will be responsible for its accuracy.

The RFA states that the District "prejudged the merits of the case" and refers to the evaluation of BDC's response to the WES report that was prepared jointly by the District and WES (RFA at 50). The referenced paper and original WES report are inconclusive for determining pre-judgement. The response states that "WES acted under the impression that the current permit application had been/would be denied by the District..." In addition, WES was told that the original application had been denied by the District due to its impacts to significant aquatic resources. As a result of their evaluation, WES concurred with the objecting agencies that the project, as proposed, failed to protect the fish and wildlife resources of the wetlands. They were not concurring with a decision to deny the current permit application as that decision had not yet been made. There is no indication why the assumption was made of the denial/intent to deny the current application.

The Appellant did not have an accurate understanding of the task that WES was charged with...to conduct a review of the revised application, studies, and reports prepared by the consultants to the applicant to determine if permit issuance for the revised plan is environmentally acceptable. There is no evidence that the District pre-judged the application and that WES did not provide an unbiased analysis of the project.

The request for elevation is inappropriate within a Request for Appeal, as these are two separate processes. An elevation involves the proposed initial decision on an application whereby a RFA involves the appeal of a decision that has already been made. Additionally, Headquarters has already denied the Appellant's request that their application be elevated from the District. The permit decision is remanded to the DE to consider all documents submitted by the applicant on behalf of his project. The District must include the short and long version of the summary permit approval forms submitted by the applicant for the District Engineer to consider in his final decision.

Summary of Findings:

Count I: The permit decision is remanded to the DE to clearly explain the District's reasoning for finding that the applicant's proposed construction and mitigation measures would not protect Liberty Gardens Wetlands from adverse impact and to re-evaluate economics within the public interest review section of his assessment.

Count II: The permit decision is remanded to the DE to clarify information regarding financial concerns arising from the District's in-house review of the Appellant's proprietary economic analysis as it relates to the on-site alternatives.

Count III: The permit decision is remanded to the DE to document how the project impacts national issues.

Count IV: The permit decision is remanded to the DE to consider all documents submitted by the applicant in behalf of his project.

J. RICHARD CAPKA
Brigadier General, USA
Commanding